United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

orig & appendix
1 brief

77-1050

To be argued by
RHONDA FIELDS

B P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1050

UNITED STATES OF AMERICA,

Appellee,

—against—

ALFRED JEAN-PIERRE,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

BERNARD J. FRIED,
RHONDA FIELDS,
Assistant United States Attorneys
Of Counsel.

UNITED STATES COURT OF APPEALS
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

OTHER AUTHORITIES

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Preliminary Statement

Appellant, Alfred-Jean-Pierre,[1] appeals from a judgment of conviction entered on January 14, 1977 in the United States District Court for the Eastern District of New York, (Platt, *J.*) after a jury trial convicting him of all counts of a three count indictment charging him with importation of cocaine, possession of cocaine with intent to distribute and a conspiracy to commit these offenses, 21 U.S.C. §§841(a)(1), 846, 952(a), 963 and 18 U.S.C. §2. He was sentenced to concurrent terms of 10 years imprisonment, a special parole term of 20 years, plus $15,000 in fines.

On this appeal it is claimed; 1) that appellant was deprived of a fair trial due to the introduction of co-

[1] Named as a co-defendant was one Louise Fingers, who was a fugitive at the time of trial.

conspirator statements, and (2) that evidence seized from the defendant as an incident to an arrest should have been suppressed.

Statement of Facts

A. The Suppression Hearing

Special Agent Michael Patrick Murphy, of the Drug Enforcement Administration, testified that on August 24, 1976 he arrested one Rita Herron upon her arrival at John F. Kennedy International Airport in possession of a quantity of cocaine. She also had in her possession approximately $80 in cash and a Miami check book. Her only identification was a Miami driver's license. She had no charge cards (p. 23).[2]

Ms. Herron, who had been advised of her rights, told the agent that: "the cocaine on her person did not belong to her but belonged to another individual on the same flight from (sic) her up from Curacao", (1). Mr. Jean-Pierre, for whom she had been carrying the cocaine had set up the trip, asked her to accompany him and according to Herron, he had supplied the money for the airline tickets for the trip to Colombia for the purchase of the narcotics (6, 22, 24, 28). Herron gave Agent Murphy a description of Jean-Pierre and said that since she had no money, she was supposed to meet Jean-Pierre outside the lobby where he was to buy tickets to Miami for both of them. She further stated that there was a New York address on Jean-Pierre's customs declaration (7, 22).

Herron described Jean-Pierre as a "National" with a short haircut, a mustache, blue leisure type suit with

[2] The numbers in parenthesis refer to the transcript of the suppression hearing and trial which were numbered, consecutively, as one transcript.

blue and white shirt, approximately 5'8", carrying a blue suitcase. She stated that he had approximately $4,000 on his person that was left over from the trip (7, 24). Agent Murphy located a customs declaration for Jean-Pierre which indicated a New York address (6, 7 and 207). Following inquiry of the airlines, he learned that an "A. Pierre" had checked in with National Airlines, and went to the National Airlines area and found defendant Jean-Pierre, who answered the above description, sitting in the main lobby. He then arrested and searched defendant Jean-Pierre, seizing a passport, tourist cards indicating entry into Colombia, $3,800, a Spanish language newspaper article, and other papers. Following advice of rights, appellant denied that he knew Rita Herron and that he had been travelling with her.

B. The Trial

Rita Herron testified that sometime before July 1976 while living in Miami, Florida, she became friendly with a Louise Fingers. On August 1, 1976, Louise Fingers took Rita Herron out for a late birthday dinner because she (Louise) had not been in Miami on July 31, 1976 for Herron's birthday. At this time, Fingers told Herron that she and Alfred Jean-Pierre had travelled out of the country in order to smuggle narcotics into the United States and, that as a result, they "had made a lot of money" (61).

Approximately one week later, while Herron was visiting at Louise Fingers' apartment, Fingers, who was then packing, told Herron that she and Alfred Jean-Pierre were taking another trip out of the country to smuggle cocaine and that she would be leaving that afternoon (20, 62). Fingers, who was not pregnant, showed Herron some newly purchased maternity clothes, and explained that she planned to conceal the cocaine in a girdle concealed under the maternity dress (62).

Approximately one week later, Fingers returned from the trip and called Herron to pick her up. Herron did so, and in the car Fingers stated that Jean-Pierre had stayed in New York to make sure the delivery of cocaine went through. She stated that they had taken an unnamed Haitian lady along with them on the trip to carry the cocaine, but that the Haitian had smuggled some of the cocaine for her own use and that they had "lost" her in the airport. Fingers stated, however, that the cocaine had gotten through and had been delivered in New York (66).

At this time, Herron, who was then actually pregnant, told Fingers that since there had been trouble with the Haitian lady, that Fingers should take her (Herron) on the next smuggling trip. Herron stated that she wanted to make some money (66, 135). A few days later, Fingers called Herron and asked her if she would like to "make a trip" immediately (24). Herron agreed to do so, and in order to prepare for the trip, she obtained a passport and went shopping with Fingers for maternity dresses and a girdle to be used to conceal cocaine on her person (68-69). On August 19, 1977, defendant Jean-Pierre came to Herron's apartment when it was time to leave for the airport. Jean-Pierre instructed Herron to hide $10,000, in $100 dollar bills, in her girdle (71-72; 79--80).

Herron and Jean-Pierre then flew to Curacao via San Juan, Puerto Rico. They remained in Curacao for a few days and went on to Medellin, Colombia. While in Curacao, they stayed at the Park Hotel where, Jean-Pierre told Herron that "he usually stayed" [3] (75). Be-

[3] This testimony was corroborated by registration cards from the Park Hotel and pictures of Herron and Jean-Pierre in Curacao (76-77, 87-90).

fore leaving from the San Juan Airport they had to get tourist cards to enter Colombia (80). Although defendant Jean-Pierre had one set of tourist cards which he used on other trips, they were no longer valid and a new set had to be obtained (141-142).

When Herron and Jean-Pierre arrived in Medellin, Jean-Pierre directed a taxicab to take them to the Horizontes Hotel, stating to Herron that he had "stayed there a lot of times and [that] it was a Haitian Hotel" (90). Because Herron opposed staying at this Hotel they, instead, registered at the Caans Hotel (90). Inside the hotel room, Jean-Pierre attempted to telephone his contact; however, because of his poor Spanish, he instructed Herron to translate for him with both the operator and his Colombian contact (91). Jean-Pierre stated that on his previous trips, one of his contacts had spoken English, and one of the girls with the contact had been an American (146). The evening of their arrival Jean-Pierre went out and met his Colombian contact, who was called the "secretary" because he acted as a clearing house for drug dealers (92, 93). The next morning, Jean-Pierre showed Herron a newspaper article and told her that several of his friends, including a contact and some Haitians staying at the Horizontes Hotel, had been arrested. Because of this they decided to check out of the Caans Hotel and moved to the home of defendant's Colombian dealer (94).

After a short while, defendant Jean-Pierre acquired the cocaine. Herron was instructed to conceal the cocaine in her girdle which she did (109-110). They then departed from Medellin and flew to John F. Kennedy International Airport via Curacao. In New York Jean-Pierre was to give Herron money so she could fly on to Miami. Before going through customs they separated and Herron was detained by customs officials who questioned her.

When informed she would be searched, she admitted that she had cocaine concealed on her person and surrendered the drugs [4] (110-111).

At this point she was placed under arrest by Agent Murphy, and, after being advised of her rights, was questioned. She stated that she was carrying the cocaine for an Alfred Jean-Pierre whom she described (206-207).

Agent Murphy testified that he located Jean-Pierre in the airport, arrested him, and advised him of his rights (208). Following his arrest Jean-Pierre was searched and seized from him were, among other things, a United States passport, a picture of Louise Fingers, a receipt for two airline tickets from the International Travel Organization, tourist cards dated August 5, 1976, a newspaper article, miscellaneous papers, and $3,800 in cash.

ARGUMENT

POINT I

The Appellant Was Not Deprived Of A Fair Trial Due To The Admission Of Co-Conspirator Statements.

Appellant argues that the trial court erred by allowing, over alleged defense objection, the introduction of three co-conspirator statements concerning cocaine smuggling trips made by Jean-Pierre in July and August, 1973.[5] Initially, we note that there was no objection

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[4] Herron had 254.18 grams of cocaine on her at the time of her arrest.

[5] The first conversation occurred on August 1, 1976. Herron testified that Fingers told her that "she and Alfred made a trip out of the country to bring in a bunch of narcotics into the country . . ." and that they would be making another trip (61).

[Footnote continued on following page]

made to the first two of these statements at the time the witness testified as to each of them (61, 62). Objection was, however, made to the third statement on the grounds that it was hearsay (64). The contention is: (1) that the statements were not made in furtherance of the conspiracy; and (2) that there was insufficient independent proof that a conspiracy existed at the time the statements were made.

As noted, no defense objection was made to the first two statements. Thus, failure to object renders the point unavailable for appellant review since an "error may not be predicated upon a ruling which admits evidence . . . unless a substantial right of the party is affected, and . . . a timely objection or motion to strike appears of record. . . ." Rule 103(a)(1), Fed. R. Evidence. Thus, absent plain error, the failure to object to these statements, is fatal.[6] See Rule 103(d), Fed. R. Evidence and Rule 52, Fed. R. Crim. Proc.; *See e.g., United States* v. *Bennett*, 364 F.2d 499, 500 (2d Cir. 1966); *United States* v. *Del Llano*, 354 F.2d 844, 847-48 (2d Cir. 1965); *United States* v. *Indiviglio*, 352 F.2d 276, 277 (2d Cir. 1965). We sub-

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The second conversation occurred approximately one week later. Herron explained that during a conversation in Fingers' apartment, Fingers said that she and Jean-Pierre were leaving that afternoon to make another trip. At this time Fingers told Herron that the cocaine would be smuggled into the country concealed under maternity clothes (62).

The third conversation occurred approximately 1½ weeks later. At this time, Fingers had just returned from the smuggling trip and told Herron of problems that she and Jean-Pierre had with a Haitian courier (63, 66). It was on this occasion that Herron volunteered to go on the next smuggling trip (66).

[6] It should be noted that in addition to failing to object at the time these statements were made, the defense did not seek to have them stricken at the close of the government's case, even though the statements were the subject of cross-examination in an attempt to establish their casual nature (130-33).

mit, for the reasons set forth below, that in any event, the declarations were properly admissible as co-conspirator statements, Rule 801(d)(2)(E), Fed. R. Evid., that there was not error at all.

When Herron testified to the third conversation, which occurred after Fingers returned from the second trip, defense counsel objected and requested a cautionary instruction concerning the use of the statement (64-65). A proper cautionary instruction was given and the statement was allowed into evidence, subject to a proper foundation being laid by the government during trial.[7]

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[7] Ms. Seltzer [defense counsel]: Objection, your Honor. This is hearsay.

The Court: Have you read Count 1?

Ms. Seltzer: Yes, and I would ask if your Honor is going to admit that, at least your Honor give a cautionary instruction unless they are able to prove conspiracy, it is inadmissible.

Mr. Schulman: It is admissible in the context of this trial.

The Court: They are admissible against a defendant if you find that prior to this conversation that the defendant was a member of the conspiracy, in accordance with the instructions I will give you at the end of the case.

In other words, you cannot hold statements of a defendant or alleged statements of a defendant, nor can you hold statements of other conspirators—Withdraw, withdraw that.

You cannot hold the statements of a person other than the defendant against the defendant, made before he became a member of the conspiracy or after the conspiracy terminated.

So, that if you find that the defendant was not a member of a conspiracy at the time the statement was made, or if you find that the conspiracy terminated, vis-a-vis this defendant, then you cannot hold these statements between these two parties on this date against the defendant.

* * *

The Court: Of course if you find there was no conspiracy or the defendant never became a member of the conspiracy, you must disregard the statements entirely.

You were reciting a conversation that you had with Miss Fingers, outside of a friend's apartment or friend's place or residence and subject to the caveats that I just gave you, ladies and gentlemen, bearing in mind, it pertains to Count 1 of the indictment, you may proceed. (64-65).

Turning to all three statements we initially note that it is basic that in order for a co-conspirator statement to be admissible, the statement must have been made in furtherance of the conspiracy. *Dutton* v. *Evans*, 400 U.S. 74, 81 (1970); *Krulewitch* v. *United States*, 336 U.S. 440, 443-444 (1949); *United States* v. *Birnbcum*, 337 F.2d 490, 495 (2d Cir. 1964). Thus, merely narrative declarations of past fact are not admissible under the co-conspirator exception to the hearsay rule. *See, e.g., United States* v. *Birnbaum, Id.* at 495; *United States* v. *Annunziato*, 293 F.2d 373, 380 (2d Cir. 1961).

The three Fingers statements, we contend, were more than mere narrative declarations. The first conversation occurred immediately after Herron had, unknowingly, aided Fingers in the concealment of the conspiracy to smuggle cocaine from Colombia, by calling, at Fingers request, her Welfare Case worker to report that Fingers was in New York visiting her sick mother (18). When Fingers returned, she not only told Herron the true reason for her absence—i.e. smuggling narcotics — but advised Herron that she and Jean-Pierre were making another trip to smuggle cocaine. The following week Fingers told Herron that she and Jean-Pierre were leaving that evening on a third trip, and explained in detail to Herron the manner in which she smuggled the cocaine into the United States concealed under maternity clothes; at this time Fingers gave Herron One Hundred Dollars ($100) and displayed to Herron a large roll of money containing hundred and fifty dollar bills.

It is quickly apparent that these three conversations were not simply casual talk between friends. Fingers had already used Herron to give an explanation of her (Finger's) absence from Miami. The explanation of the manner of operation and the statement of its past successes allowed Herron to be recruited as a courier, or,

in other words, encouraged her to "volunteer" to smuggle narcotics for Fingers and Jean-Pierre. This is made crystal clear by Finger's swift acceptance of Herron as a courier. Thus, during the period from August 1, 1976 to August 19, 1976, when Herron left Miami with Jean-Pierre, Herron had been made familiar with the methods and ease of operation of the narcotics smuggling conspiracy, tantalized with the conspiracy's profitability and, finally as a result of the third conversation, successfully recruited as a member.

Consequently, we submit that, all three conversations which were intended to recruit Herron as a co-conspirator, were in furtherance of the conspiracy to illegally import cocaine from South America. *See United States* v. *Grant*, 462 F.2d 28, 33-34 (2d Cir. 1972); *United States* v. *Manarite*, 448 F.2d 583, 590-91 (2d Cir. 1971).

But assuming *arguendo* that the first two statements were not in furtherance of the conspiracy, the admission of these statements into evidence if error at all, absent objection, was harmless. The evidence, independent of the statements, overwhelmingly proved that Jean-Pierre had conspired to and did import cocaine as charged in the indictment. Implicating him was the unimpeached testimony of his own co-conspirator. Herron was able to testify, moreover, to admissions made to her by Jean-Pierre that he had been in Colombia before, was familiar with its hotels, and had dealt with various contacts, some of whom had been recently arrested. These statements were amply corroborated by the documentary evidence seized from the defendant.

Finally, contrary to appellant's contention, the government proved Jean-Pierre's participation in the conspiracy by a fair preponderance of the evidence, independent of the hearsay statements. The well-settled law in this

Circuit is that co-conspirator declarations are admissible if the prosecution has proved the defendant's participation in the conspiracy by a fair preponderance of the evidence, independent of the hearsay utterance. *United States* v. *Stanchich*, Docket No. 76-1407, Slip op. 1277, 1284-86 (2d Cir., January 6, 1977); *See also*, *United States* v. *Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969). Following this test, it is clear that there was a fair preponderance of the evidence, independent of the hearsay statements, that Jean-Pierre had participated in the narcotics conspiracy from as early as July 20, 1976. This evidence consisted of the following items: (1) When Jean-Pierre arrived at Curacao with Herron he stated to her that he usually stayed at the Park Hotel (75); (2) before leaving Curacao for Colombia, Jean-Pierre had a set of invalid tourist cards which he stated that he had used on earlier trips (141-142); (3) Jean-Pierre, had tourist cards when arrested which had been issued to him on August 5, 1976 in Colombia (216); (4) Upon arrival in Colombia, Jean-Pierre told Herron that he had stayed "a lot of times" at the Horizontes Hotel in Medellin, and told her that his friends had been arrested at the Horizontes Hotel (90). Jean-Pierre also told Herron that he had had no language problems on his previous trips because one of his Colombian contacts had spoken English and that one of the girls accompanying a Colombian contact had been an American (146); (5) documentary evidence established that Jean-Pierre and Fingers had travelled to Colombia, as he stated, in July and early August (213-215).

This evidence, coupled with Herron's testimony concerning her own trip with Jean-Pierre to Colombia, established by a fair preponderance of the evidence, not only that Jean-Pierre was a member of the alleged cocaine conspiracy, but also that he had been involved in that conspiracy from as early as July 20, 1976. Thus, there was a proper foundation for the admission of the co-conspirator statements made after July 20, 1976.

POINT II

The Search Of Appellant Was Incidental To A Lawful Arrest.

Appellant Jean-Pierre claims that there was insufficient probable cause for his arrest. Appellant's argument is that the "two-pronged" test of *Aguilar* v. *Texas*, 378 U.S. 108 (1964) and *Spinelli* v. *United States*, 393 U.S. 410 (1969) was not met because the arrest was based upon an insufficiently corroborated statement of an accomplice of unproven reliability.

Turning first to the argument that there was no probable cause because Herron's reliability was unknown, we note that, in dealing with a similar argument in *United States* v. *Rueda*, Docket No. 76-1429 Slip Op. 1765, 1771 (2d Cir., February 10, 1977), this Court held: "This argument ignores, however those decisions rendered since *Spinelli*, in this Circuit and others, which recognize that there is no need to show past reliability where the informant is in fact a participant in the very crime at issue." The *Rueda* panel recognized that this type of case is different from the paid government informer situation. Indeed, the Court stated that its decision was in accord with past decisions of this Circuit *Ibid; see, also, United States* v. *Miley*, 513 F.2d 1191, 1204 (2d Cir. 1975), *cert. denied*, 423 U.S. 842 (1975); *United States* v. *Burke*, 517 F.2d 377, 380 (2d Cir. 1975); *United States* v. *Rodriguez*, 532 F.2d 834, 837 (2d Cir. 1976); *United States* v. *Rollins*, 522 F.2d 160, 164 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976).

The only question then, is whether the Agent, relying in Herron's statement and other corroborative facts, had probable cause to arrest Jean-Pierre. We contend that he did. The statement given by Herron following her arrest

at the airport after having just attempted to smuggle in a quantity of cocaine from Colombia, clearly showed that she was a participant in an international narcotics smuggling operation. Her statements about Jean-Pierre were based on her own personal knowledge. Indeed, she stated that she had been travelling with Jean-Pierre, that the cocaine belonged to him, that he had arranged the smuggling trip, and that he had purchased the airline tickets for the flight to Colombia. According to Herron, Jean-Pierre had given a New York address on his Customs declaration form. Herron then gave a detailed description of Jean-Pierre, which was so exact that Agent Murphy was able to identify appellant on sight. Herron stated that she had no money and was to meet Jean-Pierre who was going to buy tickets for both of them to go on to Miami. Armed with this information, Agent Murphy determined that a "Mr. A. Pierre" was registered on a National Airlines flight to Miami even though his Customs declaration gave a New York address. Thereupon, Agent Murphy searched the National Airlines Terminal and located Jean-Pierre who, as indicated above, fit the description given by Herron. To contend that Agent Murphy based as these facts, lacked probable cause to believe that he was the Jean-Pierre described by Herron is, we submit, simply frivolous.

Agent Murphy was told by Herron, a participant to the crime, that she had an accomplice. It cannot be seriously contended that this did not, in itself, constitute sufficient probable cause to arrest the accomplice if his identity could be reasonably ascertained since, as the testimony of an accomplice is sufficient to convict, it is certainly sufficient to support a finding of probable cause. *United States* v. *Long*, 449 F.2d 288, 293-94 (8th Cir. 1971), *cert. denied*, 405 U.S. 974 (1976). Herron gave an accurate description of her accomplice and provided addi-

tional identifying information, i.e., that they were scheduled to depart on a flight to Miami, thus limiting the range of possibilities. Diligent inquiry by Agent Murphy confirmed that there was, indeed, such an individual scheduled to depart on a National Airlines flight. On this data, it was certainly reasonable for the Agent to seek to locate, as he in fact did, Jean-Pierre in the National Terminal. Thus, under the circumstances Herron's story was corroborated even though only in its "innocent aspects" *United States* v. *Sultan*, 463 F.2d 1066, 1069 (2d Cir. 1969), quoted with approval in *United States* v. *Rueda*, *supra* at 1773. Accordingly, the district court quite properly denied appellant's motion to suppress the physical evidence as the product of an unlawful arrest.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: May 6, 1977

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

BERNARD J. FRIED,
RHONDA FIELDS,
Assistant United States Attorneys,
Of Counsel.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

DOLORES M. BYRD being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 10th day of May 1977 he served a copy of the within

BRIEF FOR APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:

Legal Aid Society, 509 U. S. Courthouse, Foley Square
New York, New York 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Dolores M. Byrd

Sworn to before me this

10th day of May 1977

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4701966
Qualified in Kings County
Commission Expires March 30, 1979